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No. 85-1772

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF UTAH, by and through its
DIVISION OF STATE LANDS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether title to the bed of Utah Lake, a navigable body of water, passed to the State of Utah upon its admission to the Union in 1896.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 780 F.2d 1515. The opinion of the district court (Pet. App. 28a-41a) is reported at 624 F. Supp. 622.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1985. On March 12, 1986, Justice White extended the time within which to file a peti-

tion for a writ of certiorari to and including April 25, 1986, and the petition was filed on April 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the ownership of the bed of Utah Lake. The parties have stipulated that the Lake was navigable on January 4, 1896, the date on which petitioner, the State of Utah, was admitted to the Union (Pet. App. 8a n.4). Petitioner claims that by operation of the equal footing doctrine, it has owned the bed of Utah Lake since that date. Both courts below rejected this claim, holding that the United States previously had selected the bed of the Lake for purposes of a federal reservoir, reserved pursuant to the Sundry Appropriations Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526-527.[1]

1. In late 1976, the Department of the Interior issued federal oil and gas leases on the bed of Utah Lake (Pet. App. 2a). Petitioner protested, contending that the leasing encroached upon its property interests. After unsuccessful negotiations to resolve the dispute, petitioner commenced this suit in May 1979 in the United States District Court for the District of Utah against the United States, the Secretary of the Interior, the Director of the Bureau of Land Management, and the Director of the Bureau's Utah State Office. Petitioner sought a declaratory judgment that it, rather than the United States, had

[1] Petitioner also contended in the courts below that it obtained title to the bed of Utah Lake under the Submerged Lands Act of 1953, 43 U.S.C. 1301-1343. That additional claim also was rejected by the courts below (Pet. App. 24a-26a, 40a-41a), and petitioner does not renew it here.

title to the lake bed and sought an injunction against interference by respondents with petitioner's alleged ownership and right to manage the lake bed (*id.* at 3a, 28a-29a).[2] The district court granted summary judgment for respondents, declaring that title to the lake bed is in the United States. On petitioner's appeal, the court of appeals affirmed on grounds virtually identical to those relied upon by the district court.

The question of title resolved by the courts below turns on the particular consequences of actions pertaining to Utah Lake that were taken by federal officials pursuant to the Sundry Appropriations Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526-527. That Act authorized the United States Geological Survey to select "sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows" (25 Stat. 526). The Act further provided that "all the lands which may hereafter be designated or selected * * * for sites for reservoirs * * * are *from this time henceforth hereby reserved from sale as the property of the United States*, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law" (25 Stat. 527 (emphasis added)). Pursuant to this authority, both Utah Lake and the land surrounding it were selected as a reservoir site and formally reserved as property of the United States.

[2] The district court held that it had jurisdiction over the suit under 28 U.S.C. 1331 and the Quiet Title Act, 28 U.S.C. 1346(f) and 2409a (Pet. App. 31a-32a, 36a). However, the court of appeals, relying on *Block* v. *North Dakota*, 461 U.S. 273 (1983), held that the Quiet Title Act was the exclusive basis of jurisdiction (Pet. App. 4a n.2). See also *United States* v. *Mottaz*, No. 85-546 (June 11, 1986).

Thus, in a report dated April 6, 1889, John Wesley Powell, then Director of the Geological Survey, informed the Secretary of the Interior that "the site of Utah Lake in the Territory of Utah is hereby selected as a reservoir site, together with all lands situated within two statute miles of the border of said lake at high water" (Pet. App. 10a). Both courts below held on the basis of this and other documents that the selection of Utah Lake included the bed of Utah Lake, thereby reserving the bed as property of the United States under the 1888 Act (Pet. App. 13a, 37a-38a).[3]

Thereafter, in the Sundry Appropriations Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 391, Congress, on a prospective basis, repealed the relevant provisions of the 1888 Act. But Congress expressly did not

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[3] The Geological Survey's selection of the bed of the Lake is confirmed by the Survey's official reports. The Tenth Annual Report (1888-1889) stated that Utah Lake had been examined "with reference to its capacity for a reservoir site" and that the Survey had determined "the specifications for its withdrawal as such under the law, *so far as the lands covered* or overflowed by it or the lands bordering upon it *were still public lands*" (Pet. App. 11a (emphasis added)). The Survey's Eleventh Annual Report (1889-1890) stated that "a careful survey was made of Utah Lake * * *. This land being, therefore, the natural flood ground of the lake should be reserved up to the high-water line. Accordingly, the segregation * * * was made to include *not only the bed* but the lowlands up to mean high water" (Pet. App. 11a-12a (emphasis added)). The Survey's Twelfth Annual Report (1890-1891) also referred to Utah Lake, stating that "the segregation of the land around *and under* the lake was made to a contour line which should be 5 feet above the low-water mark of 1879" (Pet. App. 13a (emphasis added)). The contemporaneous understanding therefore was that the Director of the Geological Survey intended in 1889 to select, for purposes of the 1888 Act, the lands submerged by the waters of Utah Lake.

rescind the reserved status of any land selections, such as that at issue here, that already had been made. An exception to the 1890 Act stated "that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by [the 1888 Act], until otherwise provided by law" (26 Stat. 391).

2. Both courts below held that the 1888 Act authorized the Geological Survey to select submerged lands, such as those beneath Utah Lake, and that the selection in this case was sufficient to prevent title to the lake bed from passing to petitioner upon its admission to the Union (Pet. App. 13a-15a, 21a-24a, 38a-40a). The district court held that title to the lake bed did not pass to Utah under the equal footing doctrine because "[t]he withdrawal of Utah Lake was made 'after acquiring the territory and before the creation of the state' for the carrying out of 'public purposes appropriate to the objects for which the territory was held'" (*id.* at 39a-40a, quoting *United States* v. *Holt State Bank*, 270 U.S. 49, 54-55 (1926)). The court specifically found that those "appropriate" public purposes "include irrigation for the benefit of future settlers of the arid West" (Pet. App. 40a).

The court of appeals also specifically addressed petitioner's claim that Utah could not be deprived of title to the lake bed unless the prior reservation was mandated by some "public exigency" or "public necessity" (Pet. App. 21a). The court of appeals emphasized (*id.* at 22a) that the conclusion that the reservation served an "appropriate public purpose" was based on this Court's own formulation in *Shively* v. *Bowlby*, 152 U.S. 1 (1894), which held that Congress may convey lands underlying navigable waters, and thereby defeat the State's title thereto, in order

to carry out " 'public purposes appropriate to the objects for which the United States hold the Territory' " (Pet. App. 22a, quoting 152 U.S. at 48, as quoted in *Montana* v. *United States*, 450 U.S. 544, 551 (1981)). The court of appeals further observed, however, that "[a]lthough the [district] court did not characterize its holding explicitly in terms of a 'public exigency,' we are satisfied that the withdrawal of Utah [L]ake, including its bed, was made for a public purpose motivated by a public exigency, given Congress' stated concerns [in the 1888 Act] that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. The court of appeals' application of the equal footing doctrine to the particular circumstances of this case is fully consistent with the principles recently reiterated and confirmed in *Montana* v. *United States*, 450 U.S. 544 (1981). Review by this Court therefore is not warranted.

1. States admitted to the Union after the adoption of the Constitution are deemed to be on an "equal footing" with the original 13 states. One aspect of this principle is that a newly admitted state in general has the same right as the original states to lands beneath navigable waters. *Shively* v. *Bowlby*, 152 U.S. 1, 26-28 (1894). At the same time, however, Congress has the unquestioned power to reserve or otherwise dispose of such submerged lands that have not been included within a state, and thereby to defeat the title to such lands that otherwise would pass to the state under the equal footing doctrine at the

time of its admission to the Union. Congress may do so in order " 'to perform international obligations,' " to facilitate commerce, or " 'to carry out other public purposes appropriate to the objects for which the United States hold the Territory.' " *Montana* v. *United States*, 450 U.S. at 551 (quoting *Shively*, 152 U.S. at 48). See also *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 633-634 (1970); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 87 (1918).[4] In other words, although lands underlying navigable waters are presumed to pass to the State upon admission, that presumption may be overcome where the federal government has otherwise provided for a disposition of the land prior to statehood, based on " 'some international duty or public exigency' " (*Montana* v. *United States*, 450 U.S. at 552, quoting *United States* v. *Holt State Bank*, 270 U.S. 49, 55 (1926)). The court of appeals adhered to and correctly applied those principles here.

2. As an initial matter, there can be little doubt that the selection and reservation of Utah Lake and the surrounding lands as property of the United States was for a "public purpose[] appropriate to the objects for which the United States h[e]ld the Territory" and that the United States responded to a "public exigency" in doing so. Before the passage of the 1888 Act, officials of the United States were

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[4] Even after statehood, Congress may validly authorize proceedings and transactions to confirm the pre-statehood disposition of such submerged lands to others (*Borax Consol.* v. *Los Angeles*, 296 U.S. 10, 21 (1935); *Summa Corp.* v. *California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984)), and a state that fails to present timely claims in the confirmatory proceedings is barred thereafter (*Summa Corp.*, 466 U.S. at 206-207 n.4).

"actively conducting investigations and collecting data with a view to developing and formulating a feasible plan for taking up and prosecuting" the work of reclaiming, through irrigation, the arid lands west of the 100th meridian. *Ide* v. *United States*, 263 U.S. 497, 502 (1924). Yet "[t]he opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts" (*California* v. *United States*, 438 U.S. 645, 659 (1978)). As petitioner concedes (Pet. 3, 13), there was acute concern that reservoir sites would "fall into the hands of 'monopolistic speculators' " (P. Gates, *History of Public Land Law Development* 641 (1968)). These concerns plainly were perceived by Congress in the late 19th century as giving rise to a "public exigency" requiring decisive legislative action, and that exigency is sufficient in this case to overcome the presumption that the land underlying a particular navigable body of water passes to the new state upon its admission to the Union. See *Alaska Pacific Fisheries* v. *United States*, 248 U.S. at 87-89; *Confederated Salish & Kootenai Tribes* v. *Namen*, 665 F.2d 951, 961-962 & n.27 (9th Cir.), cert. denied, 459 U.S. 977 (1982); *United States* v. *City of Anchorage*, 437 F.2d 1081, 1084 (9th Cir. 1971); *United States* v. *Alaska*, 423 F.2d 764, 766-767 (9th Cir.), cert. denied, 400 U.S. 967 (1970).

The court of appeals in fact reiterated and applied the principle, recognized in *Montana* v. *United States*, that the presumption that lands underlying navigable waters passed to the new state ordinarily will be overcome only upon a demonstration that the United States responded to " 'some international duty or public exigency' " (see Pet. App. 22a (quoting 450 U.S.

at 552)). Thus, the court of appeals concluded that "the withdrawal of Utah Lake, including its bed, was made for a public purpose motivated by a *public exigency*, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled" (Pet. App. 23a (emphasis added)). The court of appeals' application of settled principles in the particular circumstances of this case does not warrant review by this Court.[5]

3. As explained above (see page 4 & note 3, *supra*), the Geological Survey's selection and the reservation of Utah Lake expressly included the bed of the Lake. By the terms of the 1888 Act, this land, including the bed, was to remain "as the property of the United States" (25 Stat. 526-527), and it there-

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[5] Petitioner contends (Pet. 15-16) that the court of appeals' resting of its decision on a finding of "a public purpose motivated by a public exigency" constituted a departure from the Court's reference in *Montana* v. *United States* to a "public exigency." However, there is no indication that the court of appeals either intended or effected such a departure, especially since it used the term "public exigency" and discussed this Court's analysis in some detail. See Pet. App. 22a-23a. Moreover, as the Court made clear in *Montana* v. *United States*, the existence of a "public exigency" is principally a guide to ascertaining whether the United States *intended* to reserve the land for an "appropriate public purpose," which in turn would justify a disposition of the property in such a manner as to prevent it from passing to the State under the equal footing doctrine. See 450 U.S. at 556. In this case, the question of intent is clear without the need to rely on inferences, because the United States *expressly* reserved the bed of Utah Lake for the manifestly "appropriate public purpose" of promoting reclamation and orderly settlement of land. See note 3, *supra*, and pages 8-10, *infra*.

fore did not pass to the State. Petitioner argues (Pet. 16, 18-21), however, that the Geological Survey's selection was insufficient because the 1888 Act did not itself expressly refer to lands underlying navigable waters. But *Montana* v. *United States*, upon which petitioner principally relies, makes clear that an express reference in the governing Act is not required. Although the Court there stated that a pre-statehood conveyance would not be lightly inferred, it made clear at the same time that the intent to withhold land from passing to the State need not be shown by a definite declaration to that effect, so long as the intent is " 'otherwise made very plain' " (450 U.S. at 552 (quoting *Holt State Bank*, 270 U.S. 55)). Significantly, the Court also discussed with approval its prior decisions in *Choctaw Nation* v. *Oklahoma* and *Alaska Pacific Fisheries* v. *United States*, both of which held that an intent sufficient to defeat the State's claim of title could be inferred from extrinsic circumstances. See 450 U.S. at 555-556 & n.5.

Moreover, in this case the text of the 1888 Act was broad in its coverage and definite in its consequences. The enactment of the statute had the immediate effect of "reserv[ing] from sale as the property of the United States" all lands that might thereafter be designated or selected for reservoir sites.[6] The

[6] For this reason, petitioner errs in characterizing the reservation of the bed of Utah Lake as an "administrative withdrawal" by the Geological Survey in 1889 (Pet. 18-19). The 1888 Act *legislatively* reserved that land as of 1888, because the text of the 1888 Act provided that lands, even though not yet designated or selected as reservoir sites, were "hereby" reserved as of the enactment date; later selection by the Geological Survey merely established the dimensions of the legislative withdrawal. This was the contemporaneous understanding of the Attorney General, who observed that selection

1888 Act covered "all the lands" so designated or selected and, as the court below correctly observed, imposed "no restriction * * * on the type of lands that could be designated or selected" (Pet. App. 15a). Furthermore, within a year of the Act's passage, Congress was made aware of the Geological Survey's selection of Utah Lake (see *id.* at 10a), and the Tenth, Eleventh and Twelfth Annual Reports of the Geological Survey made clear that this selection included the Lake's bed. Congress did not thereafter act to repudiate either the Survey's legal position that the beds of navigable bodies of water were embraced by the reservation accomplished by the 1888 Act or the specific selection and reservation of the bed of Utah Lake. This omission is significant, because the "storm of indignation from the people of

of a reservoir site, subsequent to the 1888 Act, would accomplish "the reservation thereof *dating back to the passage of this [1888] act.*" 19 Op. Att'y Gen. 564, 566 (1890) (emphasis added).

Because the 1888 Act had the "practical effect of reserving all the public lands in the west from settlement" (*California* v. *United States*, 438 U.S. at 659), Congress enacted the Sundry Appropriation Act of Aug. 30, 1890, ch. 837, 26 Stat. 371, 391, in order to repeal prospectively the legislative reservation made by the 1888 Act (*Ide* v. *United States*, 263 U.S. 502). In respect to future reservoir selections, the 1890 Act made their reservation effective as of the selection date (26 Stat. 391). However, all prior site selections, such as the 1889 selection of Utah Lake, were confirmed (*ibid.*).

At all events, contrary to petitioner's contention (Pet. 18-21), the mere fact that a reservation of submerged lands comes to fruition by administrative action does not undermine its effectiveness for purposes of the equal footing doctrine. See, *e.g.*, *United States* v. *City of Anchorage*, 437 F.2d at 1082; *United States* v. *States of Alaska*, 423 F.2d 764, 765, 766-767 (9th Cir.), cert. denied, 400 U.S. 967 (1970).

the West" (*California* v. *United States*, 438 U.S. at 659) persuaded Congress to narrow the 1888 Act in the 1890 Sundry Appropriations Act to provide that site reservations would take effect only on the date of actual selection and designation of a site, not before. But Congress in 1890 also expressly confirmed, by the savings clause in the 1890 Act, the Geological Survey's prior selection of Utah Lake (as well as all other site selections) under the earlier Act. Accordingly, even if there had been some doubt regarding the authority of the Geological Survey to select the bed of the Lake, despite John Wesley Powell's contemporaneous construction of the 1888 Act to the contrary (see pages 3-4, *supra*), the 1890 Act eliminated any such concerns.

Finally, when Congress again passed new laws concerning reservoir sites—specifically Section 17 of the Act of Mar. 3, 1891, ch. 561, 26 Stat. 1101, 43 U.S.C. 663 (which limited the size of reserved sites to land actually necessary for reservoir construction and maintenance) and the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599, 43 U.S.C. 664 (permitting non-federal use and occupancy of such sites on certain conditions) —it again did not repudiate the previously confirmed reservation of Utah Lake and its bed.[7] This failure by Congress to overturn the administrative action when it once again revisited the subject of reservoir site selection lends still further support to the Geological Survey's 1889 selection of the bed of Utah Lake and the resulting failure of the bed to pass to Utah at statehood in 1896. *CFTC* v. *Schor*, No. 85-621 (July 7, 1986), slip op. 11; *Lindahl* v. *Office of*

[7] The background of the 1891 and 1897 Acts was discussed by this Court in *California* v. *United States*, 438 U.S. at 659-662.

Personnel Management, No. 83-5954 (Mar. 20, 1985), slip op. 12 n.15; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Chemehuevi Tribe* v. *FPC*, 420 U.S. 395, 410 (1975); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). Against this background, the courts below correctly rejected petitioner's efforts to reopen that question. Further review therefore is not warranted.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1986

[8] The question of the ownership of the bed of Utah Lake also does not at this time appear to be of significant practical importance. Although the Bureau of Land Management issued five exploratory oil and gas leases for the bed in 1976, we have been informed by the Department of the Interior that these leases were of 10-years' duration and are about to expire and that no drilling permits ever were issued for the production of oil and gas from the bed of the Lake.

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